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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

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## Comments

### AMOUNT OF FORCE AN OFFICER MAY USE TO EFFECT THE ARREST OF A MISDEMEANANT

The case of *State v. Browsers*<sup>1</sup> again brings up the problem, which has had a varied and controversial career in the Missouri courts—the use of deadly force in the arrest of misdemeanants. In the *Browsers* case, the evidence disclosed that the defendant, Harvey Browsers, jumped on a city marshal's back in order to

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1. 205 S.W. 2d 721 (Mo. 1947).

stop him from shooting at Irwin Browers, the defendant's brother, who was fleeing from the marshal after he had been told he was under arrest. In the ensuing struggle the marshal was shot by a bullet from his own gun. Defendant was convicted of felonious assault and appealed, one ground being that the trial court erred in failing to instruct on the law of self-defense. This raises the problem of the use of deadly force in stopping Irwin Browers who was in flight. If the marshal had no right to shoot at the fleeing man, then Harvey Browers had the right of self-defense to protect his brother.<sup>2</sup>

The majority opinion takes the view that there is evidence that Irwin Browers had not committed a crime at all, and so the marshal shot at him while trying to make an illegal arrest. If this view is taken then probably no court would say that the officer had a right to use deadly force to stop the fleeing person, and most courts would allow the person to use such force as is necessary to prevent the arrest.<sup>3</sup> The majority also cite *State ex rel. Kaercher v. Roth*,<sup>4</sup> that an officer is never justified in shooting at one guilty of a misdemeanor to effectuate his arrest or prevent his escape.

A separate concurring opinion written by Judge Ellison, and concurred in by Judge Leedy, takes the view that there was substantial evidence showing that the officer used more force than was reasonably necessary, but that it was a legal arrest. The marshal could have been arresting Irwin Browers either for a felony based on reasonable suspicion, or a misdemeanor (breach of peace) committed in the officer's presence. Judge Ellison contends that the officer's rights are governed by specific statutes of Missouri, the one dealing with the problem being § 3960.<sup>5</sup> The argument advanced is that this section appears in the Article on Process and covers both felonies and misdemeanors, making no distinction between a culprit in flight or one who resists, and so the officer's right would be the same in both cases.

As to resisting misdemeanants, the majority of courts in the United States follow the rule that an officer is not privileged to kill to overcome the resistance of a misdemeanor except, of course, in the case of self-defense where the officer is privileged, if reasonably necessary, to kill to protect himself.<sup>6</sup> At least two courts, namely Missouri and North Carolina, have rejected this view. In Missouri the court has changed its position with respect to this problem a number of times.<sup>7</sup> As Judge Ellison points out, the latest decision, *State v. Ford*,<sup>8</sup> expressly over-ruled the

2. MO. REV. STAT. § 4379 (1939); *State v. Eastham*, 240 Mo. 241, 144 S.W. 492 (1912).

3. WHARTON, HOMICIDE § 503 (3d ed. 1907).

4. 330 Mo. 105, 49 S.W. 2d 109 (1932).

5. "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." MO. REV. STAT. § 3960 (1939).

6. *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894); *supra* note 3 at § 490; 4 AM. JUR. *Arrest*, § 78; *Comment*, MICH. L. REV. 957 (1930); 5 MO. L. REV. 93 (1940); See note, 3 A.L.R. 1170.

7. *State v. McNalley*, 87 Mo. 644 (1885); *State v. Dierberger*, 96 Mo. 666, 10 S.W. 168 (1888); *State v. Ford*, 344 Mo. 1219, 130 S.W. 2d 635 (1939).

8. 344 Mo. 1219, 130 S.W. 2d 635 (1939).

two opinions<sup>9</sup> cited by the majority as supporting their decision in the *Browers* case. The *Ford* case concerned a resisting misdemeanor, though it considered but did not decide what the law would be when the misdemeanor flees. It would seem, however, that most of the cases involving resistance rest on the officer's right of self-defense and not on his right to kill a resisting misdemeanor. The Missouri rule has been criticized on the ground that the courts are really only trying to broaden the officer's right of self-defense so that he may be privileged where it is his duty to arrest and move forward, thus necessarily becoming the aggressor. The Missouri rule, by introducing two separate theories by which the officer may be exonerated, merely tends to confuse the jury. See 5 Mo. L. Rev. 93 (1940).

As to fleeing misdemeanants, the almost universal rule of American courts is that the officer has no right to kill or threaten with serious bodily harm in order to effectuate his arrest or prevent his escape.<sup>10</sup>

Only three Missouri decisions have been found which actually involve the right to use force against a person who is fleeing. In two of these cases, *Gray v. Earls*<sup>11</sup> and *State v. McGehee*,<sup>12</sup> there seems to have been no right to make an arrest at all, in the former (a civil action) because the misdemeanor was not committed in the presence of the private citizen who was seeking to make the arrest and in the latter because no crime of any nature had been committed. The third case, *State ex rel. Kaercher v. Roth*,<sup>13</sup> was a civil action for damages brought by a passenger in the automobile of a fleeing misdemeanor who was injured when a pursuing officer fired into the car. In all of these cases the court stated that an officer may not kill a fleeing misdemeanor in order to prevent his escape.

In 1939, in *State v. Ford*,<sup>14</sup> the court, in an opinion by Judge Ellison, reviewed its previous decisions and for the first time considered § 3571 of the Missouri Revised Statutes (1929), now § 3960 of the Missouri Revised Statutes (1939), which first appeared as § 1827 of the Revised Statutes of 1879. This statute had never been construed by the Missouri court, and the only mention it had received in this type of situation was in *State v. Banks* (1914)<sup>15</sup> in which there was dictum that it does not justify the use of unnecessary force in making an arrest. In the *Ford* case the court said that on its face the statute would appear to authorize the use of all means necessary to effect an arrest, even shooting, of either a misdemeanor or felon, both in case of flight and physical resistance. This is about the same view as expressed in the concurring opinion in the *Browers* case. But the court specifically pointed out that it was not necessary to determine what kind or amount of force an officer may use to effect an arrest of a misdemeanor when fleeing—the case concerned a situation where the prisoner *forcibly resisted*

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9. *State v. McGehee*, 308 Mo. 560, 274 S.W. 70 (1925); *State ex rel. Kaercher v. Roth*, 330 Mo. 105, 49 S.W. 2d 109 (1932).

10. Material cited note 6 *supra*.

11. 298 Mo. 116, 135, 250 S.W. 567, 573 (1922).

12. 308 Mo. 560, 274 S.W. 70 (1925).

13. 330 Mo. 105, 49 S.W. 2d 109 (1932).

14. *Supra* note 8.

15. 258 Mo. 479, 167 S.W. 505 (1914).

arrest. So although *State v. Ford* decided the question as to the amount of force an officer can use in the case of a resisting misdemeanor, and specifically overruled *State v. McGehee* and *State ex rel. Kaercher v. Roth*<sup>16</sup> on that point, it left the solution to the problem of the non-resisting misdemeanor indefinite.

The whole question of killing in order to effect an arrest has been the subject of much controversy. The common law and Missouri rule permits the killing of fleeing felons,<sup>17</sup> although the killing must be as a last resort.<sup>18</sup> This rule has been vigorously attacked, and the suggestion made that there should be no right to kill any fleeing criminal.<sup>19</sup> A Texas statute seems to so provide.<sup>20</sup> Other statutes give a right to kill fleeing persons who have committed certain specified crimes,<sup>21</sup> and there are cases indicating that the right to kill fleeing felons is restricted to capital felonies.<sup>22</sup> If the danger that one who has committed a capital offense will repeat it is regarded as greater than the danger that a police officer in shooting at him will, as does occur,<sup>23</sup> kill an innocent bystander, then there is some reason for the latter rule.<sup>24</sup>

In arriving at the most desirable solution to the problem, consideration should be given to the rights of the individuals, both officer and arrestee, and to the protection and interests of society. Certainly in the case of misdemeanants all these interests are best served by prohibiting the officer from killing the misdemeanor except where it is necessary in self-defense. There is little or no danger to the public in allowing him to remain at large as in the cases of dangerous felons. As was stated in the *Kaercher* case: "As the lawmaking power itself could not inflict the death penalty as a punishment for a misdemeanor, it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine." In our society every person's life, in theory at least, is an asset, and even in the case of a felon the law throws every protection around him, requiring a

16. *Supra* notes 12 and 13, respectively.

17. At common law the only felonies were said to be murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. See 1 BURDICK, *LAW OF CRIMES* § 77 (1946).

18. WHARTON, *HOMICIDE* § 489 (3d ed. 1907); 4 AM. JUR. § 78; 34 LAW NOTES 66 (1930-1931). *Fitzpatrick v. Commonwealth*, 210 Ky. 385, 275 S.W. 819 (1925).

19. See Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COL. L. REV. at 740 (1937), and see *id.* n. 153.

20. TEX. STAT., *Penal Code*, Art. 1212, § 8 (Vernon, 1936): "The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but, he shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with great bodily injury."

21. See, e.g., COLO. STAT. ANN. c. 48 § 45 (1935).

22. See *State v. Bryant*, 65 N. C. 327 (1871).

23. Compare the facts of *State ex rel. Kaercher v. Roth*, *supra* note 13.

24. Compare Sec. 4 of the Uniform Arrest Act, commented upon in Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, at 328-330 (1942). The Act does not permit the use of dangerous force to effect the arrest of a misdemeanor. *Ibid.*; ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* p. 26 (1947).

grand jury indictment or information before he can be tried, and a finding of guilt beyond a reasonable doubt by a jury of 12 men before he can be punished. Certainly then an officer should have no right to kill a minor offender. Even though the arrestee may get away at that particular time, he may be arrested later. If he isn't, no harm is done which justifies killing him.

The argument in the concurring opinion in the *Browers* case in favor of the officer's right to kill a fleeing misdemeanant is based upon the fact that the distinction between felonies and misdemeanors is purely technical, the penalty actually imposed for the latter frequently being greater than that imposed for many felonies, and on the statute authorizing an officer to use all necessary means to effect an arrest. As to the first point, it presents a forceful reason for adopting, by statute, the view that the officer may not kill any fleeing felon,<sup>25</sup> or at least that he may kill only if the one fleeing has committed a capital offense.<sup>26</sup> It hardly justifies extending the common law rule. The point concerning the statute depends upon an interpretation of "necessary means to effect an arrest."<sup>27</sup> It is not a necessary construction that this statute sanctions killing an offender who is fleeing. Statutes in derogation of the common law are strictly construed. And it is fairly arguable that the statute represents only an attempt to state the common law rule. Similar statutes in other states have been so construed.<sup>28</sup>

GENE S. MARTIN

#### THE FEDERAL NATURAL GAS ACT AND THE COMMERCE CLAUSE

In the case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*,<sup>1</sup> the problem concerning the state's ability to regulate interstate commerce was again brought to light. The Panhandle Pipe Line Company transported natural gas from Texas and Kansas fields into and across intervening states, including Indiana, to Ohio and Michigan. In Indiana, it furnished gas to local public utility distributing companies, who in turn supplied over 112,000 residential, commercial and industrial consumers. In addition, Panhandle also sold gas in large amounts direct to certain corporations for industrial consumption. In 1944, the Public Service Commission of Indiana decided that such direct service was subject to regulation by the commission, and issued an order in 1945 for the

25. See Wechsler and Michael, *supra* n. 18, at p. 741, n. 153.

26. See Colorado statute cited *supra* n. 21. Such statutes as these seem to clarify the officer's position with regard to the amount of force he can use to effect the arrest of fleeing criminals. He knows that he is justified in killing only when arresting for certain specific crimes, and thus these statutes exert considerable restraint on the officer tending toward caution on his part, which is probably desirable in most cases. The problem of what is reasonable force or a last resort in each particular case would continue to appear, but this type of statute would seem to give more desirable results than does the common law rule and is a step in the right direction.

27. Mo. REV. STAT. § 3960 (1939), quoted *supra* n. 5. (italics mine).

28. See Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957 at 972 (1930).

1. 68 Sup. Ct. 190 (1947).

filing of tariffs with the commission. In 1946 Panhandle brought suit to set aside and enjoin the enforcement of the commission's order. The Supreme Court of Indiana<sup>2</sup> held that even if the acts in question constituted sales in interstate commerce, nevertheless they were subject to the state's power of regulation under the doctrine of *Cooley v. Board of Wardens of the Port of Philadelphia*.<sup>3</sup>

Upon appeal to the Supreme Court of the United States, Mr. Justice Rutledge delivered the opinion of the court which held that it did not question that the sales under review were interstate commerce, and rejected the theory that when the gas entered the branch lines and the pressure was reduced thereon, such constituted a "breaking of the bulk" thus making it intrastate commerce for regulatory purposes. It was pointed out that the states could control the sales where such were direct interstate sales to the local consumers (citing the case of *Pennsylvania Gas Company v. Public Service Commission*<sup>4</sup>) but that the courts had held that the states could not interfere where the service interstate was to local distributing companies for resale to the consumers (citing the case of *Missouri v. Kansas Natural Gas Company*<sup>5</sup>). Mr. Justice Rutledge then stated that the Natural Gas Act was passed to reach those sales which under the previous decisions could not be covered by state regulation, yet which the Federal Government had failed to regulate. The Natural Gas Act<sup>6</sup> applies to transportation in interstate commerce, as well as to sales in interstate commerce for resale for ultimate public consumption of any type. But the act specifically stated that it should not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution.

The Supreme Court then held that the action of Congress "was an unequivocal recognition of the vital interests of the states and their people. . . in the regulation of rates and service."<sup>7</sup> It was pointed out that the Natural Gas Act was not designed to reduce the regulatory powers of the states. "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this court had held the states could not reach."<sup>8</sup> Thus it was held that since Congress by the passage of the Natural Gas Act, had not intended to occupy the field where the sales were interstate directly to the consumer, and since under the Pennsylvania Gas Company decision, such sales would be regulated by the state, the sales in question made by the Panhandle Pipe Line Company were subject to control by the Indiana Public Service Commission.

The cases dealing with the regulation of the transportation and distribution of natural gas by both state and federal agencies have produced many interesting problems. It has generally been accepted that the transportation of natural gas from

2. *Public Service Commission v. Panhandle Eastern Pipeline Co.*, 224 Ind. 662, 71 N.E. 2d 117 (1947).

3. 12 How. 299 (U. S. 1851).

4. 252 U. S. 23 (1920).

5. 265 U. S. 298 (1924).

6. 52 STAT. 821, 15 U.S.C. § 717 (1946).

7. 68 Sup. Ct. 190, 198 (1947).

8. 68 Sup. Ct. 190, 196 (1947).

one state to another, is a transaction in interstate commerce.<sup>9</sup> For many years the courts accepted as law the intimation of Chief Justice Marshall in the early cases, that the power to regulate commerce between the states was exclusively in the Federal Government.<sup>10</sup> But in 1851 the Supreme Court of the United States in *Cooley v. Board of Wardens of the Port of Philadelphia*<sup>11</sup> set out the doctrine that although a transaction is considered interstate commerce, yet if it is of such local concern as to make it impracticable for federal regulation, the states may still regulate said commerce providing such regulation does not interfere substantially with interstate commerce. This doctrine was applied in the case of *Pennsylvania Gas Company v. Public Service Commission*.<sup>12</sup> There the Supreme Court of the United States held that the delivery of gas from Pennsylvania to Jamestown, New York, directly to the consumers was interstate commerce, but that the sale to said consumers was so local in nature that it could be regulated by the New York Commission so long as the Federal Government had not acted to control it.

The main case differs from the *Pennsylvania Gas Company* case only in that here there were sales both directly to the consumers (industrial) and to the local distributing companies. The latter having been held to be interstate commerce which can be regulated only by the Federal Government, the question is whether where both are found together, the former may be regulated by the states.

In the *Pennsylvania Gas Company* case, the court attempted to distinguish the *Landon* case<sup>13</sup> therefrom. There the Kansas Natural Gas Company owned pipe line extending from gas fields in Oklahoma to Kansas and Missouri, where it delivered gas to local distributing companies in 37 cities in Kansas and eight in Missouri. The arrangement provided that the pipe line company was to receive two thirds of the rate charged by the local distributing companies as compensation for said gas. The question was whether the respective state public utility commissions had the authority to set up rates for the sale by the distributing companies of the gas to the local consumers. The United States Supreme Court held that ". . . in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. . . . Interstate movement ended when the gas passed into local mains."<sup>14</sup> The sole distinguishing feature between the *Pennsylvania Gas Company* case and the *Landon* case was that in the latter there was an intervention of the local distributing companies. The

9. *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911); *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217 (1912); *Public Utilities Commission v. Landon*, 249 U. S. 236 (1919); *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23 (1920); *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277 (1921); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923); *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298 (1924).

10. U. S. CONST. ART. VIII, § 3; *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827).

11. *Supra* note 3.

12. *Supra* note 4.

13. *Public Utilities Commission v. Landon*, 249 U. S. 236 (1919).

14. *Id.* at 245



Court seemed to think that the sale to the local distributing companies was sufficient to bring the interstate character to an end, and that the states could regulate any activity thereafter. The *Landon* case was specifically approved by the Supreme Court of the United States in the case of *Missouri v. Kansas Natural Gas Company*.<sup>15</sup> There the pipe line company increased its rate to the local distributing companies in Missouri, and contended that the state had no power to control such rates. Mr. Justice Sutherland, speaking for the Court held that the subsequent sale and delivery by the distributing companies was intrastate commerce and subject to state regulation. "But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different states. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end. . . . The paramount interest is not local, but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned."<sup>16</sup>

In 1919, the Supreme Court of West Virginia<sup>17</sup> held that where electrical current was transmitted from Virginia to West Virginia by high tension wires, then reduced to commercial voltage and distributed directly to various consumers, such was interstate commerce, but "The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally. . . touching those outside of the community."<sup>18</sup> The court held that such rates could be controlled by the state, and rejected the view that the reducing of the voltage terminated interstate commerce.

In 1922, however, the Supreme Court of Kansas in the case of *State ex rel Helm v. Kansas Natural Gas Company*<sup>19</sup> went so far as to apply the doctrine of the *Pennsylvania Gas Company* case to the situation where the interstate shipment of gas was to a local distributor for resale to the local consumer. The court compared the case with the *Pennsylvania Gas Company* case and thought that "So far as the Kansas Natural Gas Co. is concerned, the distributing companies in this state may be considered the consumers of the gas sold. If that is correct, there is no difference between the present case and the Pennsylvania Gas Co. Case."<sup>20</sup> It held that the regulation of the sale of natural gas was necessary, and since Congress had not attempted to regulate such sales, the regulation was not national in character and could be controlled by the various states. This case has not been followed by the courts to any extent.

To the other extreme is the case of *State ex rel Cities Service Company v. Public Service Commission*<sup>21</sup> where the Missouri Supreme Court held that the state

15. *Supra* note 5.

16. *Id.* at 309.

17. *Mill Creek Coal & Coke Co. v. Public Service Commission*, 84 W. Va. 662, 100 S.E. 557, 7 A.L.R. 108 (1919).

18. *Id.* at 674, 100 S.E. at 562.

19. 111 Kan. 809, 208 Pac. (1922).

20. *Id.* at 812, 208 Pac. at 623.

21. 337 Mo. 809, 85 S.W. 2d 890 (1935).

could not regulate the price at which gas was sold by the pipe line company directly to the industrial consumers. There the gas was piped into the state and sold to certain distributing companies and also directly to twelve companies for industrial use outside the cities. The court held that ". . . the only reasonable inference to be drawn from the evidence is that the gas is delivered from the foreign state directly to the industrial consumer in the state in compliance with a contract that was in existence between such consumer and the Pipe Line. . . . It therefore follows. . . that the Pipe Line was engaged in interstate commerce when it was delivering gas to the 12 industries and that the Commission does not have jurisdiction of the Pipe Line on account of these sales. . . ."<sup>22</sup> This case ignored the holding in the *Pennsylvania Gas Company* case, and found that such sales directly to the consumer were not local, but national in character, and could not be regulated by the state. The reason for this holding might be found in the fact that in the *Pennsylvania Gas Company* case the sales were made directly to many individuals to supply their household needs, while in the *Cities Service* case, the sales were made directly to large industrial consumers in such great quantities as to justify the finding that the transaction was national in character.

This review of the cases indicates that although some courts have deviated from the accepted view, it is safe to say that the rule of the *Pennsylvania Gas Company* case is well established in connection with the power of the state to control the interstate sale of gas directly to the consumer, as is the rule set out in *Missouri v. Kansas Natural Gas Company* with regard to the inability of the state to control the interstate sale of gas to the local distributing companies for resale to the consuming public.

In addition to the doctrine set out in the *Pennsylvania Gas Company* case, there was formulated another theory by which the states might control the sale of gas shipped into them from a foreign state. To determine when such a shipment changed from interstate to intrastate commerce, the courts utilized Chief Justice Marshall's "Original Package Doctrine."<sup>23</sup> The Supreme Court of Kansas<sup>24</sup> was the first to use this doctrine to determine when the shipment of gas became intrastate commerce. The question in that case was whether the Public Utilities Commission of Kansas had jurisdiction to control the rates charged by the local distributing companies for gas shipped from Oklahoma to Kansas and delivered to those companies by the Kansas Natural Gas Company. The court conceded that the transportation of natural gas from one state to another was interstate commerce. But it held that "The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. . . . The gas, when sold, had become mixed with the common mass of property in this state by being so commingled with gas produced here as to completely lose its identity."<sup>25</sup> The court also indicated that interstate commerce was at an end when the bulk of the im-

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22. *Id.* at 824, 85 S.W. 2d at 897.

23. *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827).

24. *State v. Flannelly*, 96 Kan. 372, 152 Pac. 22 (1915).

25. *Id.* at 383, 152 Pac. at 26.

ported gas was broken up for indiscriminate distribution to individual purchasers at retail sales.

Another early and very important case which set forth the original package doctrine as a method of determining the distinction between interstate and intrastate commerce in gas was that of *West Virginia and Maryland Gas Company v. Towers*.<sup>26</sup> There the gas company obtained gas in West Virginia and piped it to Maryland where the pressure was reduced to that satisfactory for consumption, and it was sold to the local consumers. In determining whether the rates to the consumers could be controlled by the state, the Supreme Court of Maryland cited the *Flannelly* case with approval, and pointed out that when the gas entered the intermediate lines the pressure was reduced thereon because the pressure in the main pipe line was too high for service to the consumers. "At this point it is separated from the other gas in the main pipe and forced into the intermediate lines, from whence it cannot return to the main line, but remains in such intermediate pipe line to be consumed when needed."<sup>27</sup> The court held that this separation of the gas from the main pipe line was such a breaking of the original package as to remove it from interstate commerce and subject it to state regulation.

In *Public Utilities Commission v. Landon*<sup>28</sup> where the facts were the same as in the *Flannelly* case, the Supreme Court of the United States held that the sale of gas by the local distributing companies to the consumers was purely intrastate commerce. The court did not discuss the original package doctrine but thought that the interstate movement ended when the gas passed into the local mains.

In 1937 the question of when the transportation of gas ceases to be interstate commerce and becomes intrastate commerce was dealt with in the case of *Department of Public Utilities v. Arkansas-Louisiana Gas Company*.<sup>29</sup> There the gas company purchased gas in Texas and Louisiana and transported it into Arkansas where it was delivered to certain industries and public utility distributing companies. The Arkansas Department of Public Utilities ordered the gas company to file certain forms with it, concerning said activities. The company refused, contending that as the gas was transported in interstate commerce, the Public Utilities Commission had no jurisdiction over it. The Supreme Court of Arkansas pointed out that the department relied on the original package theory, and held that "At all times there is a supply of gas in the thousand miles of mains. . . . Such gas. . . is affected by heat and cold, and by climatic variations."<sup>30</sup> In case of shutdown of consumers, the transportation of gas would be delayed indefinitely. The court then concluded that the conception to be drawn from the course of the gas company's action ". . . is that it has developed a practical system whereby, if let alone, more than half of its sales in Arkansas will escape regulation by the state. . . ."<sup>31</sup> It

26. 134 Md. 137, 106 Atl. 265 (1919).

27. *Id.* at 145, 106 Atl. at 268.

28. *Supra* note 13.

29. 194 Ark. 354, 108 S.W. 2d 586 (1947).

30. *Id.* at 370, 108 S.W. 2d at 594.

31. *Id.* at 371, 108 S.W. 2d at 594.

held that the state did have the power to regulate the activities in question. The Supreme Court of the United States, however, refused to decide whether such transactions were interstate or intrastate commerce, holding that the filing of rates was not a burden on interstate commerce, thus no constitutional question was involved.<sup>32</sup>

In 1931, the original package doctrine was again given the support of the United States Supreme Court in the case of *East Ohio Gas Company v. Tax Commission of Ohio*.<sup>33</sup> There the gas company purchased gas mined in West Virginia at the Ohio-West Virginia line and piped it at the same pressure to various points within the state where the pressure was reduced and the gas was sent out over distribution lines to local supply mains. The State of Ohio attempted to impose an excise tax on the sales of such gas, and the gas company contended that the sales were in interstate commerce. Mr. Justice Butler, speaking for a unanimous court, held that the mere change of title to the gas at the state line did not determine the question of where the interstate commerce ended. But it was pointed out that when the gas passed from the distribution lines into the supply mains it was relieved of most of its pressure, the volume was expanded and it was divided into many tiny streams that entered the small service lines connecting the mains with the pipes on the consumer's premises. "The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce. . . ."<sup>34</sup> With the exception that this case involved an effort on the part of the state to tax certain transactions instead of attempting to regulate such, the facts in the *East Ohio* case are similar to those in the *Pennsylvania Gas Company* case. The Court recognized this fact, and held that the *Pennsylvania Gas Company* case was disapproved to the extent that it was in conflict with the *East Ohio* decision. This ruling seemed to put an end to the possibility of the Federal Government controlling such sales as those in the *Pennsylvania Gas Company* case, by "occupying the field."<sup>35</sup> Herein lies the great difference between the rule which was set out in the *Pennsylvania Gas Company* case, and the original package doctrine. Under the former, the states could control the interstate commerce which was local in nature, so long as the Federal Government did not act thereon. While under the latter doctrine, the transaction is considered purely intrastate commerce, the control over which is generally in the state. This would mean that the adoption of the *East Ohio* ruling would greatly reduce the possibility of the Federal Government ever regulating the transactions which were formerly considered interstate commerce. However, in the case of *Illinois Natural Gas Company v. Central Illinois Public Service Company*,<sup>36</sup> the Supreme Court of the United States pointed out that earlier decisions turned by applying the mechanical test for determining when

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32. *Arkansas Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U. S. 61 (1938).

33. 283 U. S. 465 (1931).

34. *Id.* at 471.

35. Howard, *Gas and Electricity in Interstate Commerce*, 18 MINN. L. REV. 611, 676 (1934); 49 U. OF MO. BULL. L. SER. 5, continued in 50 U. OF MO. BULL. L. SER. 5, 18 (1935).

36. 314 U. S. 498 (1942).

interstate commerce ends and intrastate commerce begins, namely ". . . upon the introduction of the gas into the service pipes of the distributor."<sup>37</sup> The Court thought the better view was to look to the ". . . nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce."<sup>38</sup> The *Pennsylvania Gas Company* case was then cited as an example of this view. The Court, however, left a way out by adding that even if it should be found that the interstate commerce had ceased, the result would be the same because the transaction in question was so intimately associated with the commerce, and would so affect its volume moving interstate, as to be within the congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself.

In the *Panhandle* case<sup>39</sup> the Court relied upon the *Illinois Natural Gas Company* case, and stated that ". . . those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement, and resulting sales we have here."<sup>40</sup> Thus it would seem that the Supreme Court for the present at least, has turned back from its decision in the *East Ohio* case, to again embrace the holding in the *Pennsylvania Natural Gas Company* case, that the shipment of gas directly to the consumer from out of state, is not affected by the original package doctrine, and is considered interstate commerce.

After it is decided that the transaction in question constitutes interstate commerce, but of such a local nature that it can be regulated by the state until the Federal Government acts thereon, the question then arises as to just when the Federal Government does occupy the field. As we have seen, it had become well settled, that the states could regulate the transportation and sale of natural gas which was purely intrastate commerce, and also the sale of natural gas interstate directly to the consumer. It was also well settled law that the states could not regulate the sale of natural gas interstate to an independent distributor for resale to the consumers. This meant that until the Federal Government acted, the natural gas companies were to be left uncontrolled as to the latter transaction, and because of the connection between such transaction with the intrastate sales, this placed a hardship upon the states in attempting adequately to regulate such industries. It was to reach those sales that the Federal Natural Gas Act was passed in 1938.<sup>41</sup> This act gave the Federal Power Commission jurisdiction over (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. However, Section 1 (b) of the act specifically stated: ". . . but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to

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37. *Id.* at 504.

38. *Id.* at 505.

39. *Supra*, note 1.

40. *Id.* at 193.

41. *Supra* note 6.

the facilities used for such distribution or to the production or gathering of natural gas."<sup>42</sup>

In 1941 the case of *United Fuel Gas Company v. Public Utilities Commission of Ohio*<sup>43</sup> was decided, in which it was held by a federal district court that the Federal Natural Gas Act had occupied the field, to prevent the state from regulating local features of interstate commerce. There the United Fuel Gas Company produced gas in West Virginia and shipped it to the local distributing corporation in Portsmouth, Ohio. The Public Utilities Commission of Ohio attempted to regulate not only the rate at which the local distributing corporation sold its gas, but also the rate at which the United Fuel Company sold the gas to the local distributing corporation. The court held that regardless of the right or jurisdiction of the Ohio Commission to issue the order complained of, the Natural Gas Act deprived it of any further jurisdiction. The transaction involved was squarely covered by the act. It was pointed out that prior to the Natural Gas Act, it was permissible for the state to regulate local features of interstate commerce in gas (citing the *Pennsylvania Gas Company* case). But "Since the federal statute has been enacted, giving to the Federal Power Commission the power to fix the contract rate between plaintiff and the Portsmouth Gas Company, the Congress has occupied the field and the power is exclusive in the Federal Power Commission."<sup>44</sup> The court indicated that under the Natural Gas Act the Ohio Commission might have filed a complaint with the Federal Power Commission charging that the rates were unreasonable, and that the act authorized the Federal Power Commission to require the gas companies to turn over to the states information from which they could determine whether the rates were reasonable. This was thought to be sufficient protection for the states, and that to allow the states to retain jurisdiction over the gas company in the face of the Natural Gas Act would be a violation of the commerce clause.

Because the Natural Gas Act provided that the Federal Power Commission should act in such cases, the Court did not find it necessary to determine how much beyond that point the act would "occupy the field" where the attempted regulation was local in nature.

In *Illinois Natural Gas Company v. Central Illinois Public Service Company*,<sup>45</sup> the United States Supreme Court discussed the scope of the Federal Natural Gas Act thoroughly. In that case the Central Public Service Company filed a petition with the Illinois Commerce Commission for an order requiring the Natural Gas Company to furnish natural gas to it at wholesale. The latter owned a pipe line system wholly in Illinois, obtaining its gas interstate from the Panhandle Eastern Pipe Line Company. The defense was that the Natural Gas Company was engaged in interstate commerce, and was therefore under the exclusive jurisdiction of the Federal Power Commission. The state supreme court held that there had been such a breaking of the bulk that the transaction of the Natural Gas Company was

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42. 52 STAT. 821, 15 U.S.C. § 717(b) (1946).

43. 46 F. Supp 309 (S.D. Ohio 1941).

44. *Id.* at 313.

45. *Supra* note 36.

purely intrastate commerce and subject to the jurisdiction of the Illinois Commerce Commission.<sup>46</sup> However, the United States Supreme Court held that the transaction was interstate commerce, and that the Congress, by the Natural Gas Act, had brought under national control the very matters which the state had undertaken to regulate by the order.

Mr. Chief Justice Stone went to the original committee reports upon the Natural Gas Act<sup>47</sup> and pointed out that the avowed purpose of the act was "...to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation. . . . By its enactment Congress undertook to regulate a defined class of natural gas distribution without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases."<sup>48</sup> The Court then held that since the Natural Gas Act provided for the control of the extension of facilities for the transportation of natural gas to be in the Federal Power Commission, that the wholesale distribution of gas moving interstate, had been intended to be brought thereunder.

The Federal Natural Gas Act was again invoked in 1944, when the city of Cleveland, Ohio requested that the Federal Power Commission check the rates at which the Hope Natural Gas Company delivered gas to the East Ohio Pipe Line Company at the Ohio-West Virginia Line.<sup>49</sup> There the gas was produced in West Virginia by the Hope Company, piped to the West Virginia-Pennsylvania-Ohio lines where it was sold to various pipe line companies in those states. The East Ohio Company piped the gas on to Akron and Cleveland where it distributed it directly to the consumers. The Federal Power Commission, pursuant to the Natural Gas Act, found the rates charged by the Hope Company to be unreasonable and ordered

46. *Central Illinois Public Service Co. v. Illinois Natural Gas Co.*, 375 Ill. 634, 32 N.E. 2d 157 (1941).

47. H. REP. NO. 709, Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., April 28, 1937. The Committee said of the proposed bill:

"It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

48. *Illinois Natural Gas Company v. Central Illinois Public Service Company*, *supra* at 506.

49. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591 (1944).

it to decrease its interstate rates by some three and a half million dollars annually. The company objected to the jurisdiction of the Federal Power Commission. The United States Supreme Court held that as stated in the house report on the Natural Gas Act, the basic purposes of it was to occupy the field in which such cases as *Missouri v. Kansas Natural Gas Company*,<sup>50</sup> and *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company*<sup>51</sup> had held the states might not act. "...the bill was designed to take 'no authority from State commissions,' and was 'so drawn as to complement and in no manner usurp State regulatory authority.'"<sup>52</sup> Here the court thought that the Government had occupied the field and had given the Federal Power Commission jurisdiction to act in such a case.

A review of the above cases would seem to indicate that the Natural Gas Act was passed by Congress with the intention that it supplement the state action so that those phases of interstate commerce which up to then were uncontrolled, could be so regulated. The *Panhandle* case seems to be a culmination of the efforts of the courts to ascertain exactly how much of the field the Natural Gas Act has occupied. It was there pointed out that although Congress intended to occupy the field by the passage of the Natural Gas Act, it was meticulous to take in only territory which the courts had held the states could not regulate.<sup>53</sup> And thus it would seem that Congress has not occupied the field of interstate activity of a local nature to any great degree, and that unless the activity in question is specifically set out in the Natural Gas Act itself, it will be considered to still be within the power of the states to act thereon.

CLARENCE F. HOMAN

#### LIABILITY INSURANCE TAKEN OUT BY MISSOURI SCHOOL DISTRICTS

The centralization of schools and the consequent extensive use of school busses by school districts has raised some interesting problems in the field of insurance law.

School districts frequently carry liability insurance in connection with their ownership and operation of school busses for the transportation of students. These policies usually contain two clauses which are of importance in considering the value of such insurance to the school district. The first of these clauses is as follows: "(The company agrees) to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, . . ."<sup>54</sup> The other clause is: "No action shall lie against the company. . . until

50. *Supra* note 5.

51. 273 U. S. 83 (1927).

52. Federal Power Commission v. Hope Natural Gas Co., *supra* at 611..

53. 68 Sup. Ct. 190, 196 (U. S. 1947).

1. The quoted provision is taken from a specimen of an automobile policy which conforms to the Standard Provisions (February, 1946) drafted and promulgated by the National Bureau of Casualty and Surety Underwriters (an organization of stock casualty companies) and the Mutual Casualty Insurance Bureau (an organization of mutual casualty companies), which together formulate basic policy provisions for use in connection with rate schedules in most parts of the United States. The quoted provision is also found in the few policies examined by me which are being used in Missouri at the present time.



the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."<sup>2</sup>

Although the language of the two clauses differs to some extent, they both make a judgment against the insured or liability at law of the insured, a condition precedent to recovery from the insurer by the injured party.<sup>3</sup> If the insured is a school district this condition precedent cannot be satisfied because it is the general rule in the United States, which is followed in Missouri, that a school district is not liable in tort for injuries sustained by reason of the negligence of its employees.<sup>4</sup> Thus it has been held that the injured party could not have the advantages of the liability insurance although the school district had paid a substantial sum in premiums to the insurer.<sup>5</sup>

The exact question has not arisen in Missouri but a recent decision of the Kansas City Court of Appeals, *Stedem v. Jewish Memorial Hospital Ass'n. of Kansas City*,<sup>6</sup> the holding and reasoning of which have been expressly approved by the supreme court,<sup>7</sup> would seem to indicate that the injured party could not recover from the insurer without obtaining a judgment against the insured. In the *Stedem* case, defendant was a charitable hospital and plaintiff was a patient injured by reason of the negligence of a nurse employed by the defendant. Defendant hospital was insured against liability for the negligence of its employees by a policy which contained an agreement by the insurer "to pay all loss by reason of the liability imposed by law. . . upon the Insured. . ." Defendant, being a charitable hospital, was not liable in tort for the negligence of its employees. The court said at page 471: "It thus appears, by the terms of the policy, that the insurance company agreed to pay any loss of the insured (the defendant) to the extent of the latter's liability, only. . . To hold that defendant's liability was increased by the mere existence of the insurance policy would, in effect, be writing a different contract of insurance than that entered into between the parties." Although the action was not against the insurer in this case the language of the court quoted above would indicate that

2. See note 1 *supra*.

3. *American Indemnity Company v. Hale*, 71 F. Supp. 529 (W.D. Mo. 1947); *Taverno v. American Auto Ins. Co.*, 232 Mo. App. 820, 112 S.W. 2d 941 (1938); 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4853 (1942); 6, Part 2, BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* § 4073 (1945).

4. *Krueger v. Board of Education*, 310 Mo. 239, 274 S.W. 811 (1925); *Dick v. Board of Education*, 238 S.W. 1073 (Mo. 1922); *Cochran v. Wilson*, 287 Mo. 210, 229 S.W. 1050 (1921); *McClure Brothers v. School District of Tipton*, 79 Mo. App. 80 (1899). 47 AM. JUR., *Schools*, § 57; 56 C.J., *Schools and School Districts*, § 622; Note 160 A.L.R. 11 (1946) (This note contains 273 pages and appears to completely cover the problem of tort liability of school districts).

5. *Ayers v. Hartford Accident & Indemnity Co.*, 106 F. 2d 958 (C.C.A. 5th 1939); *Hughes v. Hartford Accident & Indemnity Co.*, 223 Ala. 59, 134 So. 461 (1931); *Kesman v. School District of Fallowfield Township*, 345 Pa. 457, 29 Atl. 2d 17 (1942); *Boice v. Board of Education of Rock District*, 160 S.E. 566 (W. Va. 1931); *accord*, *Brooks v. Clark County*, 297 Ky. 549, 180 S.W. 2d 300 (1944).

6. 187 S.W. 2d 469 (Mo. App. 1945); *cf. Haines v. Harrison*, 211 S.W. 2d 489 (Mo. 1948).

7. *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W. 2d 615 (1946).

under a policy containing such a provision, the liability of the insured would have to be established by a judgment before the injured party could recover from the insurer.

It has frequently been argued on behalf of the pupil injured because of the negligent operation of a school bus that the immunity, from a suit in tort, of a school district should be held to be waived when the district carries liability insurance. In the absence of statutory regulation,<sup>8</sup> this argument has not prevailed.<sup>9</sup>

The foregoing discussion covers situations where the policy contains no extended coverage or omnibus clause. Such clauses usually read as follows: "The unqualified word 'insured'. . . includes the named insured and, . . . also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided actual use of the automobile is with the permission of the named insured. . ."<sup>10</sup> It has been held, when the policy contains an omnibus clause, that a judgment against a person using the vehicle with the permission of the owner is an "insured" within the clause specifying that "No action shall lie against the company. . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."<sup>11</sup> Thus the injured party can proceed against the insurer after recovering a judgment against the person using the vehicle with the permission of the named insured.<sup>12</sup>

If the policy carried by the school district contained an omnibus clause it would at least make it possible for the injured pupil to receive the advantage of the policy and to recover from the insurer in most cases. This would be accomplished by first bringing an action against the driver of the school bus and then after final judgment was rendered in that action, proceeding against the insurer.<sup>13</sup> If the purpose of the school district is to give protection to the members of the community in case of a tragic accident, then a policy containing an omnibus clause would probably accomplish that purpose. However, some situations can be imagined where an omnibus clause would not give the desired result. If the board were responsible for the maintenance of the bus and an accident resulted because of the board's negligence while the driver was not negligent, then an omnibus clause would

8. *Taylor v. Knox County Board of Education*, 292 Ky. 767, 167 S.W. 2d 700 (1942). (This case gives an interesting account of the reason for the adoption of a statute making school districts liable in tort to the amount of the insurance carried. The Kentucky statute was passed in 1940 after a pupil was killed by the operation of a school bus in 1938. The administrator of the pupil killed was not allowed to recover although the school district carried liability insurance.)

9. *Wallace v. Laurel County Board of Education*, 287 Ky. 454, 153 S.W. 2d 915 (1941); *Kesman v. Fallowfield Township School District*, 345 Pa. 457, 29 Atl. 2d 17 (1942). Note 145 A.L.R. 1337 (1943).

10. See note 1 *supra*.

11. *Elliott v. Behner*, 150 Kan. 876, 96 P. 2d 852 (1939); *Lajoie v. Central West Casualty Co.*, 228 Mo. App. 701, 71 S.W. 2d 803 (1934); *Di Gregorio v. Skinner*, 351 Pa. 448, 41 Atl. 2d 653 (1945); *Government Personnel Automobile Ass'n. v. Haag*, 131 S.W. 2d 978 (Tex. Civ. App. 1939).

12. See note 11 *supra*.

13. Mo. REV. STAT. § 6010 (1939).

be of no value to the injured pupil. Another situation where the omnibus clause would not allow the injured pupil to recover is presented in a recent Missouri case.<sup>14</sup> The case holds that if the tort-feasor dies before a suit has been filed the cause of action does not survive. Thus if the driver were killed in an accident caused by his negligence or if he died before a suit was brought against him then the injured pupil could not satisfy the condition precedent of a judgment against the insured and could not recover from the insurer. It should also be noted that the driver employed by the school district is getting the benefit of liability insurance while the school district pays the premium although it has no need for liability insurance since it is not liable in tort.

There would seem to be a real question in regard to the authority of a school district to carry liability insurance on school busses owned and operated by it. If such authority is to be found in Missouri it must come from Missouri Revised Statutes § 10326 (1939) which reads in part as follows: "The board of directors . . . shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, . . ." There are no cases in Missouri on this problem but the courts of Tennessee and West Virginia have considered cases involving statutes of the same general nature as the Missouri Statute.<sup>15</sup>

In the Tennessee case<sup>16</sup> the statute relied upon as giving the county board of education authority to take out liability insurance was as follows: "Transportation may be provided for groups of children of school age. . . ; provided, further, that the county board of education may require the driver of any vehicle to make bond in the amount not less than five hundred dollars for the faithful performance of the duties that the position imposes; . . ."<sup>17</sup> The court reasons that the authority of the board to require the driver to give a bond ". . . is but a mode of insuring against the consequences of his negligence."<sup>18</sup> Thus if the board insures against the consequences of the driver's negligence by liability insurance it serves the purpose of the statute and is within the authority of the county board of education. Section 10326 of the Missouri Revised Statutes (1939) contains a clause which is almost identical with the one stressed by the Supreme Court of Tennessee in reaching the decision that a school district has authority to carry liability insurance. The Supreme Court of Appeals of West Virginia<sup>19</sup> reached a result contrary to that of the Tennessee court previously discussed. It was an action by a board of education to collect \$708.85 which represented the amount of premiums on a liability policy carried by plaintiff's predecessor for a period of one year. A statute gave the board

14. *Haines v. Harrison*, 211 S.W. 2d 489 (Mo. 1948).

15. *Rogers v. Butler*, 170 Tenn. 125, 92 S.W. 2d 414 (1936); *Board of Education v. Commercial Casualty Ins. Co.*, 116 W. Va. 503, 182 S.E. 87 (1935).

16. *Rogers v. Butler*, *supra* note 15.

17. TENN. CODE § 2495 (1932).

18. *Rogers v. Butler*, 170 Tenn. 125, 92 S.W. 2d 414 at 415 (1936).

19. *Board of Education v. Commercial Casualty Ins. Co.*, 116 W. Va. 503, 182 S.E. 87 (1935).

authority "to provide at public expense for the transportation of pupils to and from. . . consolidated schools, or other schools where transportation of pupils may be necessary."<sup>20</sup> The court held that this statute was not sufficient to give either express or implied authority to the district board to procure liability insurance. The fact which, according to the court, was the most impressive was that the school district was paying a substantial premium and was getting very little in return. The defendant insurance company urged that the policy was of value to the board, namely: (1) to enable passengers and the public to enforce the personal liability of bus drivers for negligence; (2) to pay the expense of litigation and all costs taxed against the insured; (3) to defend any suit even if groundless; (4) to reimburse the assured for any surgical relief imperative at the time of the accident. The court points out that these services are merely of secondary importance and would not justify the substantial premium paid for the policy. Primarily the policy was to insure the school district against legal liability and the district being immune from liability in tort, the policy did not accomplish that purpose. The court thus held that no implication of authority to procure liability insurance could arise in the situation just discussed.

The two cases are not necessarily *contra* as the statutes involved are couched in slightly different terms. If the matter arose in Missouri the reasoning of the Tennessee Court could be followed as Missouri Revised Statutes § 10326 gives the board of directors authority to require the bus driver employed to give a bond just as did the Tennessee statute. Query whether the authority to require a bond which would be paid for by the employee should by implication give the board authority to carry liability insurance which would be paid for by the board.

The West Virginia statute and Missouri Revised Statutes § 10326 would both seem to give the board of education general power to deal with free transportation of pupils. Neither of the statutes contains any specific provisions which are helpful in solving the problem as to the authority of a school district to take out liability insurance. Thus since neither statute grants express authority, the fact that the West Virginia court inquired as to what the school district is getting in return for its premium and found that the protection afforded by the policy did not justify the substantial premium would seem to be entitled to a great deal of weight in any future adjudication concerning the problem.

Liability insurance, like other forms of insurance, must be supported by an insurable interest in the insured. Contracts of insurance not founded on such an interest would be void as wagering contracts.<sup>21</sup> An insurable interest exists, in the case under consideration, where the insured may be liable for damages resulting

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20. W. VA. CODE § 18-5-13 (1931).

21. *Ocean Accident and Guarantee Corp. v. Bear*, 220 Ala. 491, 125 So. 676 (1929); *Commonwealth Casualty Co. v. Arrigo*, 160 Md. 595, 154 Atl. 136 (1931); *Standard Life & Accident Insurance Co. v. Bambrick Bros. Construction Co.*, 163 Mo. App. 504, 143 S.W. 845 (1912). 29 AM. JUR., *Insurance*, § 376; 7 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4253 (1942); 1 COOLEY'S BRIEFS ON INSURANCE 326 (2d ed. 1927); 44 C.J.S., *Insurance*, § 198; Note 77 A.L.R. 1256 (1932).

from the use of the vehicle upon which the insurance is carried.<sup>22</sup> Although no cases have been found on the question, it would seem that, if the school district were the only insured under the policy and could not be liable for the type of injuries supposedly insured against, then there would be a lack of insurable interest and the policy would be void as a wagering contract. However, if the policy had an omnibus or extended coverage clause anyone using the vehicle with the permission of the named insured would also be an insured. Thus the driver employed by the district would be an insured under the policy and would have an insurable interest in that he might be liable for damages resulting from the use of the vehicle upon which the insurance is carried. It would seem then that if the policy contained an omnibus clause it would be supported by an insurable interest and not void as a wagering contract.

ROBERT L. ROSS

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22. *Ocean Accident and Guarantee Corp. v. Bear*, 220 Ala. 491, 125 So. 676 (1929); *Commonwealth Casualty Co. v. Arrigo*, 160 Md. 595, 154 Atl. 136 (1931). 29 AM. JUR., *Insurance* § 376; 1 COOLEY'S BRIEFS ON INSURANCE, 326 (2d ed. 1927); 44 C.J.S., *Insurance* § 198; VANCE, *INSURANCE* § 50 (2d ed. 1930).